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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 329

THOMAS RIGGING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. A, pp. 1-9) is reported at 211 F. 2d 153. The findings of fact, conclusions of law, and order of the National Labor Relations Board, including the Intermediate Report of the Trial Examiner (R. 20-59, 70-83), are reported at 102 NLRB 65.

JURISDICTION

The judgment of the court below was entered on June 11, 1954 (Pet. App. A, pp. 10-14). A peti-

tion for rehearing was denied on June 8, 1954. The petition for a writ of certiorari was filed on September 3, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and Section 10(e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

The Board found that petitioner violated the National Labor Relations Act (a) by discriminating against job applicants because of their union membership and (b) by acting in concert with a labor organization to engage in such conduct, and the court of appeals determined that the charge of discrimination by petitioner was supported by the record, but that proof of an understanding between petitioner and the labor organization was not adequately established. The questions presented are:

1. Whether the court erred in enforcing the Board's order against petitioner without remanding the case to the Board for further consideration.

2. Whether the Board's assertion of jurisdiction over petitioner was proper.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in Appendix B to the Petition (pp. 15-17) and *infra*, pp. 14-16.

STATEMENT

I. The Board's Findings of Fact

The Board made ultimate findings (1) that petitioner's operations affected commerce within the

meaning of the National Labor Relations Act (R. 71; 26-27); (2) that petitioner denied employment to four job applicants "for express discriminatory reasons" (R. 72, n. 3), *i.e.*, because they were not members of the Millwrights' Local (Local 642, United Brotherhood of Carpenters and Joiners, AFL), thus violating the Act; and (3) that petitioner also violated the Act, together with the Millwrights, by agreeing to adopt and by following an unlawful hiring arrangement pursuant to which job applicants had to be "cleared" by the union (R. 75).[1] The subsidiary facts upon which these findings rest, insofar as pertinent here, may be summarized as follows:

A. *Petitioner's operations at the Rheem Plant*

Petitioner is engaged in hauling, rigging, and installing machinery solely within the State of California (R. 23; 95-96). In August 1951, petitioner began installing machinery at the San Pablo, California, plant of the Rheem Manufacturing Company, which had recently been constructed for the purpose of manufacturing ordnance material for the armed forces (R. 23; 117-118, 125). The machinery installation was performed by petitioner under a subcontract with Christensen and Lyons, the general contractor for the plant's construction

[1] Petitioner's acts of discrimination against the named job applicants and its alleged general understanding with the Millwrights to follow a system of clearances had been made the subject of separate charges in the complaint. R. 10-11.

(R. 23-24; 118-122, 108). Under that subcontract petitioner agreed to move the machinery from the railroad siding on the plant's premises and to install it at the appropriate place within the plant (R. 24; 126).

The machinery installed by petitioner is valued at more than $1,500,000 and is used in the manufacture of mortar shells and cartridge cases for the armed forces (R. 25; 102, 119-120). All of the machinery was paid for by the Government and shipped to the Rheem plant from arsenals and plants in various States of the United States (R. 25; 119, 127).

During the period from August 1951 to the first of April 1952, petitioner was paid approximately $52,000 for its services in moving and installing machinery at the Rheem plant (R. 25; 102-105). From November 1951 through March 1952, the value of shell components manufactured by Rheem and shipped outside of California was $650,000 (R. 124). In April 1952 alone, $389,000 worth were shipped across state lines (R. 25; 123).

Upon the above facts, the Board concluded that petitioner's operations affected commerce within the meaning of the Act and that the assertion of jurisdiction in this case would effectuate the policies of the Act (R. 71; 26-27).

B. *The unfair labor practices*

On August 8, 1951, Manuel Gonsalves asked petitioner's general foreman, Jack Burgman, for work

at the Rheem plant (R. 30; 128-129, 134). Burgman stated that he could use Gonsalves "around the first of the week" and asked him "what local [he] belonged to" (R. 31; 131-132, 137). Gonsalves stated that he belonged to International Association of Machinists (hereinafter called the Machinists) (*ibid.*). Burgman, himself a member of Millwrights Local 102 of the International Brotherhood of Carpenters, told Gonsalves "not to quote him" but that he would "have to belong to the Millwrights Union" and that he would have "to see" Cecil, the business agent of the Carpenters "before [he] could go to work there." (R. 71, n. 3, R. 72, 31; 135-137, 131-132).

Rex Renner, another member of the Machinists, applied for work at the plant on August 9, 1951 (R. 32; 151-153). Burgman told Renner that he "would like" to have him on the job but that Renner "would have to go down and get clearance to go to work from Mr. Cecil" (R. 32; 153). When Renner expressed doubt that Cecil would clear him in view of the fact that he (Renner) was a member of the Machinists, Burgman replied that there was a position open for him if he could obtain clearance from Cecil (*ibid.*). On August 13, 1951, Renner reported to Burgman that Cecil had refused to give him a clearance (R. 33; 153). Burgman answered that his hands were "tied" and that he had to take the men "they issue us a clearance" (R. 33; 155-156).

On August 13, 1951, Leroy Young, also a member

of the Machinists, asked Foreman Burgman for work installing the machinery (R. 34; 170-171). Burgman replied that he would need men the following week and that Young should leave his name and address with the timekeeper so that Burgman could reach him (R. 34; 170-171). After leaving the information, Young asked Burgman "If I did get the job who would I have to get the clearance from" (R. 35; 171). Burgman replied that Young would "have to see Mr. Cecil down at the Carpenter's Hall" (*ibid.*). Young then asked Burgman why this was so, and Burgman said, "Well, we are bound by the AGC [Associated General Contractors of America, Inc.],[5] and any man coming down here hired on the job must be cleared through Millwrights" (R. 35; 171-172).

On September 4, 1951, Philip Glen asked Burgman for a job (R. 36-37; 198). When Glen, in response to Burgman's inquiry, stated that he was a member of the Machinists, Burgman replied that there were no jobs open at that time and anyhow that "all my men are millwrights." Glen left his name with Burgman. (R. 37; 199-200.)

Petitioner did not thereafter offer employment to any of the four applicants (R. 37; 199). However, at about the time that Gonsalves and Renner applied for employment, Foreman Burgman sought the aid of Cecil in locating three AFL millwrights

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[5] Referring to a master agreement between AGC and the Carpenters' Union which contained a union shop provision. This provision, as the Board found (R. 74, n. 4), was not effective during the period here in question.

for employment (R. 44; 226-229, 337-339). Two of these were hired on August 13, 1951, five days after Gonzalves and Renner had unsuccessfully sought employment and the same day that Young applied (R. 44-45; 296, 322, 343). A total of eight men were hired for erection work after the four Machinists requested employment but not one of the eight was a member of the Machinists (R. 43-45, 47; 283, 291-298, 300-301, 343-344).

II. The Board's Conclusions and Order

The Board held that the evidence summarized above, standing "alone," showed that petitioner had discriminated against the four named applicants because they were not members of the Millwrights and had not obtained clearance from that union, and that it accordingly established a violation of section 8(a)(3) of the Act (R. 72, n. 3). The Board further found that petitioner discriminated against these applicants as a direct result of an arrangement or understanding with the Millwrights, and that petitioner and the Millwrights had thereby violated, respectively, section 8(a)(1) and (3) and section 8(b)(2) and (1)(A) of the Act (R. 73-75).[5]

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[5] Since, as we explain below (pp. 9-10), petitioner's conduct was violative of the Act, whether or not it was acting pursuant to an understanding with the Millwrights, we have not set forth in detail the evidence which the Board deemed sufficient (but which the court of appeals regarded as inadequate) to establish that the Millwrights were party to such an understanding. See R. 31, 32, 73-75.

The Board ordered petitioner and the Millwrights to cease and desist from the unfair labor practices found. It also directed that petitioner offer the four named individuals immediate employment; that petitioner and the Millwrights jointly and severally make them whole for any loss of pay they may have suffered by reason of the discrimination against them; and that both post appropriate notices of compliance with the order (R. 77-81).

III. The Decision of the Court of Appeals

The court below (Pet. App. A, pp. 19) upheld the Board's assertion of jurisdiction. It also affirmed as "fully supported by the record" the Board's finding that petitioner had refused to hire the four job applicants because they were not members of the Millwrights. It accordingly enforced the Board's order against petitioner. However, it set aside the order insofar as it was directed to the Millwrights, stating that the "evidence point-[ed] unerringly to an unlawful hiring policy on the part of [petitioner]," but that it was insufficient to establish a connection by the Millwrights with petitioner's unlawful conduct.[4]

ARGUMENT

1. Petitioner contends (Pet. 10-13) that the court below, having rejected the Board's finding that the discriminatory refusal to hire the four job applicants resulted from an understanding between

[4] This was also the position of Board Member Murdock, who dissented in part from the Board's decision (R. 81-83).

petitioner and the Millwrights, should have remanded the case to the Board to determine whether petitioner had "unilaterally" discriminated against them. The short answer is that the Board found that, irrespective of proof of an understanding with the Millwrights, petitioner's refusal to employ the four applicants was for "express discriminatory reasons" (R. 72, n. 3). On this basis alone, the Board found that it was "clear" that petitioner had engaged in an unfair labor practice prohibited by the Act (*ibid.*). The evidence fully justified this conclusion and there is no occasion for a second review of the underlying factual issue. *National Labor Relations Board* v. *Pittsburgh Steamship Company,* 340 U.S. 498, 503.

This is not, as petitioner seeks to argue, a case in which the court has provided new findings and a new rationale in order to sustain the administrative order. It is a case in which the Board's order, so far as petitioner is concerned, was rested on two grounds, each of them independently sufficient to establish a violation of the Act. The finding set aside by the court was necessary only to a holding that the Millwrights had also violated the Act. The court's rejection of the Board's conclusion that an *agreement* to discriminate was sufficiently established did not impair the Board's conclusion that the evidence showed *actual* discrimination of a prohibited kind by petitioner.

Petitioner's further assertion (Pet. 17) that the court enforced the Board's order on the basis of a

"not improbable" finding of fact and thereby substituted "[s]peculation * * * for proof" misstates the court's opinion. The court found (Pet. App. A, pp. 7-8) that "the evidence points unerringly to an unlawful hiring policy on the part of [petitioner]." It added, in exculpating the Millwrights from responsibility for petitioner's discriminatory hiring policy, that (Pet. App. A, p. 8) "it is not improbable that [petitioner] voluntarily chose to do so on a unilateral basis." Whether petitioner adopted its illegal hiring policy unilaterally or by agreement with others is, of course, irrelevant to the question of petitioner's responsibility under the Act. It is enough that petitioner discriminated against the four applicants on the basis of their union membership.[5]

2. Equally lacking in merit is petitioner's contention (Pet. 13-15) that the court below disregarded petitioner's status as a subcontractor and erroneously sustained the Board's exercise of jurisdiction in the instant case. As stated above (pp. 3-4), at the time the unfair labor practices occurred, petitioner was engaged in installing at the Rheem plant machinery which was being shipped there from points outside the State of California. The

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[5] *Radio Officers* v. *National Labor Relations Board*, 347 U.S. 17, 45 (n. 53), 54; *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 532-533 (C.A. 6); *National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853-854 (C.A. 8); *National Labor Relations Board* v. *Fry Roofing Co.*, 193 F. 2d 324, 327 (C.A. 9); *National Labor Relations Board* v. *Don Juan Co.*, 185 F. 2d 393 (C.A. 2).

plant had been constructed, and the machinery being installed by petitioner was to be used, for the purpose of manufacturing military supplies for the armed forces. These, in turn, were to be shipped to various states. Manifestly, any labor dispute arising out of the installation of the machinery would have tended seriously to hamper both the movement of the machinery across state lines and Rheem's interstate operations. The potential adverse impact of industrial strife upon the interstate movements of the machinery and of the manufactured military supplies sufficed, under established principles, to sustain the Board's jurisdiction over petitioner.[6] The circumstance that petitioner was a subcontractor at the Rheem plant does not militate against this conclusion. For, as the court below correctly pointed out, "the policy of the Act to prevent the burdening or obstruction of interstate commerce cannot be frustrated by the simple expedient of sub-contracting" (Pet. App. A, p. 4)[7]

[6] *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197; cf. *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 661-662, 665; *Martino* v. *Michigan Window Cleaning Co.*, 327 U.S. 173, 175-177; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 525, 526; *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 14; *Thomas* v. *Hempt Bros.*, 345 U.S. 19. See also, *National Labor Relations Board* v. *Fainblatt*, 306 U.S. 601; *National Labor Relations Board* v. *Denver Bldg. & Construction Trades Council*, 341 U.S. 675, 683-685; *Polish National Alliance* v. *National Labor Relations Board*, 322 U.S. 643, 647-648.

[7] Nothing in *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, cited by petitioner, suggests a contrary result.

Contrary to petitioner's assertion (Pet. 13-15), there is no conflict between the decision here and the Board decisions cited in the petition. In those cases, decided subsequent to the Board's decision here, the Board, in the exercise of its discretionary authority (*National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 684), has merely enunciated standards which are to govern the future exercise of its statutory jurisdiction. There is no suggestion in those cases that the Board lacks jurisdiction over an enterprise like petitioner's. All that they indicate is that under its revised standards the Board might not currently assert its statutory jurisdiction over a person similarly situated. "The fact that by a self-denying rule or order made since this complaint was filed and order entered, the Board has set limits to the exercise in the future of the jurisdiction it possesses is not a matter of which [the petitioner] may avail."[8] *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C.A. 5), certiorari denied, 341 U.S. 950. So long as "the

[8] The court below did not specifically address itself to this question. The Eighth Circuit in *National Labor Relations Board* v. *National Gas Co.*, decided August 10, 1954, 34 LRRM 2694, has held, for reasons that are not entirely clear, that a Board order directed to an enterprise over which the Board would not assert jurisdiction under its current policy was not entitled to enforcement. The court apparently gave decisive weight to the circumstance, not present here, that the Board had subsequently "expressly overruled" the decision in which the order had been issued because the Board deemed it to be an "unwarranted extension" of its then controlling jurisdictional policy (*Brooks Wood Products*, 107 NLRB No. 71).

Board acts within its statutory and constitutional power it is not for the courts to say when that power should be exercised." *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378, 383 (C.A. 9), certiorari denied, 341 U. S. 909.[9]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

JOHN FRANCIS LAWLESS,
Attorney,
National Labor Relations Board.

OCTOBER, 1954.

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[9] *Accord: Haleston Drug Stores, Inc.*, v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C.A. 9), certiorari denied, 342 U.S. 815; *National Labor Relations Board* v. *Gulf Public Service Co.*, 116 F. 2d 852, 854-855 (C.A. 5); *National Labor Relations Board* v. *Mid-Co Gasoline Co.*, 183 F. 2d 451, 453 (C.A. 5); *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 181 F. 2d 34, 36 (C.A. 2), affirmed, 341 U.S. 694.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth in the petition, are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; [and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the em-

ployees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:][10] * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) * * *;

* * * * *

---

[10] By the Act of October 22, 1951, par. (b), 65 Stat. 601, Section 8 (a) (3) of the Act was amended by striking out the bracketed portion of the first sentence and inserting in lieu thereof the following:

"and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), and (h), and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement:"

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 329

THOMAS RIGGING COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITIONER'S REPLY BRIEF.

ALLAN L. SAPIRO,
625 Market Street, San Francisco 4, California,
DOUGLAS A. NYE,
435 Russ Building, San Francisco 4, California,
Counsel for Petitioner.

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In the Supreme Court
OF THE
United States

October Term, 1954

No. 329

Thomas Rigging Company,
Petitioner,
vs.
National Labor Relations Board,
Respondent.

PETITIONER'S REPLY BRIEF.

The real basis of this petition is the conflict among the circuits on the principal questions of:

1. Whether a Board order should be enforced against an employer, where, by intervening changes of policy and rules, the Board no longer asserts its jurisdiction over such employer.

2. Whether the Court may enforce an order against a subcontractor employer twice removed from interstate commerce.

In our petition, we pointed out that the Court of Appeals erred in extending the jurisdiction of the Board to a subcontractor twice removed from interstate commerce, contrary to the Board's intervening policy and decisions. However the National Labor Relations Board's brief in opposition, in seeking to answer the contentions made in the petition (Pet. 9, 13-16), hurries over the conflict between the several circuits, and thus demonstrates the need for settlement by this Court of an important question of federal law, namely:

Whether changes by the National Labor Relations Board in policy, either by decision, regulation or jurisdictional standards, are applicable to cases pending in enforcement proceedings, to prevent enforcement of an order made prior to such change.

Accordingly, the purpose of this reply brief is to show:

(a) The error in the Board's argument and its attempt to minimize the conflict between the circuits; and

(b) To direct the attention of this Court to the particular errors of the Court below. (See Pet. 9, specifications 4, 5, 6 and 7).

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1. **MAY THE COURTS BELOW ENFORCE ORDERS IN CASES IN WHICH THE BOARD WILL NO LONGER EXERCISE JURISDICTION?**

The question of whether, in enforcement proceedings, the Court of Appeals may base its decision on

the old rule, or whether the Court is bound by the new policies of the Board, changing the old rule, is now before this Court in two cases: The petition herein, No. 329, and *Foreman & Clark v. National Labor Relations Board,* No. 389, October Term, 1954, also from the Ninth Circuit.

a. The National Gas Company Case.

National Labor Relations Board v. National Gas Co., 8 Cir., 1954, 215 F. 2d 160, 162, 163, concerns circumstances similar to those herein.

In that case the Board sought enforcement of its order of May 27, 1952, against the employer. On November 30, 1953, while enforcement proceedings were pending, the *Brooks Wood Products* decision, 107 NLRB No. 71, was handed down. There the Board had declined to assert jurisdiction under circumstances similar to those in the *National Gas Co.* case.

The Court of Appeals for the Eighth Circuit denied the enforcement of the Board's order, explaining that since, as conceded by Board counsel, the company did not come within the scope of the Board's present jurisdictional requirements, the reviewing Court must apply the law in its present form, and not as it existed at the time of the decision and order of the Board.[1]

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[1]215 F.2d at 163. The Court cited the following cases supporting this rule: *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538; *Carpenter v. Wabash R. Co.*, 309 U.S. 23; *Schaff v. R. W. Claxton, Inc.*, D.C. Cir. 1944, 144 F.2d 532; *Schilder v. Gusik*, 6 Cir. 1950, 180 F.2d 662. Decisions of this Court affirming this rule are set out in Appendix A-1, *post*.

The Appellate Court also discussed the Board's decision that new regulations shall apply to *pending* as well as future cases, and the effect such provision would have on post-enforcement proceedings.[2]

b. The Petitioner's Case Herein.

The trial examiner upheld the Board's jurisdiction over petitioner, a subcontractor twice removed from interstate commerce, by relying on the *Hollow Tree Lumber Co.*[3] and *Westport Moving & Storage Co.*[4] cases (R. 26, 27). This determination was affirmed by the Board[5] (R. 71).

The Board's petition for enforcement was filed in the Court below on May 13, 1953, and the Board's brief was filed on September 1, 1953. Thereafter petitioner herein filed its brief.

Subsequently, the Board rendered its rulings in the *Brooks Wood Products,*[6] *Casey Welding Works,*[7] and *Atkinson Electric Co., Inc.*[8] cases. Each of these held that it would not effectuate the policies of the Labor Management Relations Act for the Board to assert jurisdiction over a subcontractor employer whose services are twice removed from interstate commerce. In the latter two decisions, the Board

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[2] 215 F.2d at 163. See 34 LRR 261, Board's announcement of standards applying to pending cases.
[3] 91 NLRB 635.
[4] 91 NLRB 802.
[5] 102 NLRB 1.
[6] 107 NLRB No. 71.
[7] 107 NLRB No. 185.
[8] 108 NLRB No. 105.

also emphasized that the *Hollow Tree Lumber Co.*[9] and *Westport Moving & Storage Co.*[10] standards were *not* applicable to subcontractors.

The majority of the Board in *Casey Welding Works*[11] held, in effect, that the decision of the Board in the case herein, *Thomas Rigging Company*,[12] was no longer the law (See Pet. 13-16).

The Court below affirmed the Board's exercise of jurisdiction by relying on the *Hollow Tree Lumber Co.*[13] and *Westport Moving & Storage Co.*[14] cases (Pet., Appendix A, 3). It rejected petitioner's argument that the Board's then, and now, current rule was that the standards of such cases were no longer applicable to subcontractors (Pet., Appendix A, 3-4).

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2. THE CONFLICT AMONG THE CIRCUITS.

The Board admits that it would not assert its statutory jurisdiction over a person in petitioner's circumstances at the present time (Board Br. 12). The question now is whether the Courts below must recognize the shifts in Board policy in enforcement proceedings.

The *National Gas Co.* decision holds that an order of the Board will not be enforced against an employer

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[9] 91 NLRB 635.
[10] 91 NLRB 602.
[11] 107 NLRB No. 185.
[12] 102 NLRB 1.
[13] 91 NLRB 635.
[14] 91 NLRB 602.

over whom the Board, by reason of intervening changes of law, would no longer assert its jurisdiction.[15]

In the present case, the Ninth Circuit refused to follow the current rules and decisions of the Board, and, contrary to the *National Gas Co.* decision, granted enforcement based on old rules no longer in effect. The Court below refused petitioner's alternative request that the matter be remanded to the Board for its further consideration of this case in light of its changed policies and standards.

In *Foreman & Clark, Inc. v. National Labor Relations Board,* 9 Cir. 1954, 215 F. 2d 396, petition for certiorari filed in this Court on October 6, 1954, No. 389, the Ninth Circuit again, in conflict with the *National Gas Co.* decision, enforced an order resting on an application of an old rule, subsequently changed by recent decisions of the Board.

In an earlier case, relied on by the Board herein, the Fifth Circuit enforced a Board order despite an intervening change in jurisdictional standards. *National Labor Relations Board v. Red Rock Co.,* 5 Cir. 1951, 187 F. 2d 76, 78. This case was carefully distinguished by the *National Gas Co.* opinion, wherein it was pointed out that the 1950 jurisdictional changes applied only to future cases, whereas the present changes applied to future and *pending* cases.

Thus both the petition herein, No. 329, and *Foreman & Clark v. National Labor Relations Board,* No.

[15] 215 F.2d at 163.

389, concern the refusal of the Ninth Circuit to recognize, in enforcement proceedings, changes in the Board's jurisdictional standards and policies as they apply to subcontractors such as petitioner, and other intervening changes in Board policies and yardsticks. Such refusal directly conflicts with the decision of the Eighth Circuit in the *National Gas Co.* case, the latter being in accord with decisions of this Court.[10]

It is important for this Court to determine this question of federal law, and to resolve this conflict among the several circuits, namely: Whether Courts, in enforcement proceedings, must recognize the new Board law, rules, jurisdictional limitations and yardsticks, promulgated after the particular Board decision, while the matter is *sub judice*.

Until determination by this Court, such a conflict as to the effect of new, intervening Board policies on enforcement of a prior order, will lead to considerable litigation concerning the status of cases. See "New NLRB Yardsticks Prevent Enforcement of Prior Order", C.C.H. Labor Service, 50, 147, par. 50,023; "Applying New NLRB Rules to Pending and Decided Cases", 34 LRR No. 35, Analysis 69-72.

Within the past year the Board has reversed a series of its former holdings and rules. The major importance of such reversals upon pending cases is well illustrated by the above described direct conflict

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[10]For decisions of this Court, see Appendix A-1, *post*. In *Rosenblum v. Federal Trade Commission*, 2 Cir. 1954, 214 F.2d 338, the Commission's change of position as to construction of the statute was held to be grounds for vacating the enforcement decree.

in decision between the Eighth and Ninth Circuits. A decision by this Court settling this question of federal law is of great importance to the administration of the Labor Management Relations Act.

CONCLUSION.

For reasons set forth in the petition herein, and further discussed in this reply brief, we respectfully submit that the petition for certiorari should be granted.

Dated, San Francisco, California,
October 27, 1954.

Respectfully submitted,
ALLAN L. SAPIRO,
DOUGLAS A. NYE,
Counsel for Petitioner.

(Appendix A-1 Follows.)

Appendix A-1

A. Questions of law, practice, procedure, evidence, jurisdiction, etc., are determined according to the law prevailing at the time of the appellate court's decision, and not that in force at the time the judgment appealed from is rendered.

Public Utilities Com. v. United Fuel Gas Co., 317 U.S. 456, 466;

Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538, 543;

Carpenter v. Wabash Railway Co., 309 U.S. 23, 27;

Watts, Watts & Co. v. Unione Austriaca Navigazione, 248 U.S. 9, 15;

Gulf, C. & S. F. R. Co. v. Dennis, 224 U.S. 503, 505;

Thompson v. Louisiana, 203 U.S. 131, 135;

New Orleans Flour Inspectors v. Glover, 160 U.S. 170;

Wells v. Green, 159 U.S. 453, 455;

United States v. The Peggy, 1 Cranch 103, 110.

B. In disposing of a case, an appellate court is bound to consider any change, either in fact or in law,

which has supervened since the judgment of the trial court.

Patterson v. Alabama, 294 U.S. 600, 607;*

State Tax Commission v. Van Cott, 306 U.S. 511;*

Landis v. North American Co., 299 U.S. 248, 258, 259;

Ashcraft v. Tennessee, 322 U.S. 143, 156;

Huddleston v. Dwyer, 322 U.S. 232, 236.

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*Remand to the trial Court held proper to enable it to deal appropriately with a change occurring since its judgment and having a bearing upon the right disposition of the case.

FILED
DEC 30 1954
HAROLD B. WILLEY, C

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1954

No. 329

THOMAS RIGGING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A REHEARING OF ORDER ON PETITION FOR A WRIT OF CERTIORARI.

ALLAN L. SAPIRO,
625 Market Street, San Francisco 4, California,
DOUGLAS A. NYE,
435 Russ Building, San Francisco 4, California,
Counsel for Petitioner.

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In the Supreme Court
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OCTOBER TERM, 1954

No. 329

THOMAS RIGGING COMPANY,
Petitioner,
vs.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A REHEARING OF ORDER ON PETITION FOR A WRIT OF CERTIORARI.

Your petitioner, Thomas Rigging Company, respectfully prays for a rehearing of the order of this Court dated November 8, 1954, denying the Company's petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

BASIC FACTS.

Thomas Rigging Company was a subcontractor twice removed from interstate commerce, performing millwright and rigging services for a contractor engaged in the installation of machinery and equipment at the Rheem plant, San Pablo, California. The Company received approximately $52,000 from the contractor for services rendered (R. 367).

The Board exercised its jurisdiction on two grounds: First, the Company furnished services valued in excess of $50,000 per annum to Rheem, a company producing goods destined for out-of-state shipment valued in excess of $25,000 per annum. *Hollow Tree Lumber Co.* 91 NLRB 635. Second, the Company performed vital services to a company engaged in the production of goods for national defense. *Westport Moving and Storage Co.* 91 NLRB 902 (R. 367). The Court below relied on these two decisions in affirming the Board's jurisdiction over the Company (R. 367). Petitioner's contention that the standards of these two cases were not applicable to subcontractors,[1] was rejected by the Court below (R. 368).

ARGUMENT.

Intervening decisions of the National Labor Relations Board, rendered on October 26, 1954, have expressly overruled the two cases, *Hollow Tree Lumber*

[1]See *Brooks Wood Products* 107 NLRB No. 71; *Casey Welding Works* 107 NLRB No. 185; *Atkinson Electric Co., Inc.* 108 NLRB No. 105.

Co. and *Westport Moving and Storage Co.*, on which the Board and the Court below relied to exercise jurisdiction over petitioner. One of the October 26, 1954 decisions states that under the July 1, 1954 jurisdictional standards, the Board would not have taken jurisdiction over petitioner Thomas Rigging Company.

INTERVENING DECISIONS OF THE BOARD.

Breeding Transfer Co. 110 NLRB No. 64, 35 LRRM 1021, held intrastate links of interstate commerce come within the Board's jurisdiction only if the annual income exceeds $100,000 per year. The dissent cited *N.L.R.B. v. Thomas Rigging Co.* 211 F. 2d 153, the case herein, as authority opposing the Board's current recognition of the contractual relationships between companies. 35 LRRM at 1033, n. 32.

Jonesboro Grain Drying Cooperative 110 NLRB No. 67, 35 LRRM 1038, overruled *Hollow Tree Lumber Co.* 91 NLRB 635, and held that to come within the Board's jurisdiction, an enterprise furnishing goods or services to other enterprises must render services valued at $100,000 or more, 35 LRRM 1040, n. 15.

Maytag Aircraft Corp. 110 NLRB No. 70, 35 LRRM 1056, overruled *Westport Moving and Storage Co.* 91 NLRB 902, 35 LRRM 1056, n. 15. The Board's jurisdiction over enterprises whose operations affect national defense was asserted only if the employer provided goods or services directly related to national

defense, pursuant to government contracts, including subcontracts, of $100,000 or more per year. 35 LRRM 1057.

The dissenting opinion states:

"An even more illuminating example is that to be found in the Thomas Rigging Company case.[16]

"[16]*Thomas Rigging Company*, 102 NLRB 65, enforced, as modified, 211 F. 2d 153 (C.A. 9)." (Emphasis added. 35 LRRM 1059.)

'There the employer was engaged in the installation of $1,500,000 worth of machinery for an 81mm. mortar shell line in an ammunition plant. The Employer received $52,000 for these services *which, of course, had to be performed before the plant could commence production.* This production, incidentally, amounted to more than half a million dollars worth of shells in a 6-month period at a time during the Korean conflict when there was certainly no surplus of ammunition for our troops. A labor dispute arose which involved the employees of the Thomas Company. A panel of *two former Board members and myself asserted jurisdiction under the Westport doctrine,* and issued a decision and order as to the merits of the dispute. The Court of Appeals thereafter specifically affirmed the assertion of jurisdiction on the ground that a 'work stoppage in the Company's project of installing machinery at the [ammunition] plant due to a labor dispute would impede the production of vitally needed defense material.' *Yet if the $100,000 requirement of the majority had been in effect at that time, the Board would not have exerted its efforts to prevent an interruption of the production of hundreds of thousands of dollars of critically needed*

ammunition simply because the Thomas Company had receipts of only $52,000 for its services."

The grounds for the granting of this petition, based on intervening circumstances occurring after the filing of the petition for writ of certiorari, and which have a controlling effect on the case herein, include the following:

1. There is now an important question of federal law which has not been, but should be settled by this Court, namely are the July 1, 1954 changes in jurisdiction policy to be retroactively applied to proceedings pending in the reviewing courts?

By the criteria in the July 1, 1954 standards of jurisdiction, and as explained in the *Jonesboro Grain Drying Cooperative* 35 LRRM 1038 and *Maytag Aircraft Corp.* 35 LRRM 1056, 1059, the activities, operations and $52,000 income of petitioner Thomas Rigging Company would not bring it within the jurisdiction of the Board at the present time. Whether such changes apply to cases pending in the courts, such as the cause herein, is a matter over which the several circuits conflict.

In *National Labor Relations Board v. National Gas Co.* 8 Cir. 215 F. 2d 160, 162, 163, enforcement of the Board's order was denied where the company did not come within the scope of the Board's present jurisdictional requirements.

In *National Labor Relations Board v. Dixie Terminal Co.* 6 Cir., October 21, 1954, 35 LRRM 2059, where the Board's order had been enforced and cer-

tiorari denied by this Court on June 7, 1954, 347 U.S. 1015, the July 1, 1954 jurisdictional changes were held not applicable to an enforcement proceeding. The matter having become final prior to the change, vacation of the decree of enforcement was denied.

Edwin D. Wemyss, d.b.a. Coca-Cola Bottling Company of Stockton 110 NLRB No. 134, November 10, 1954, 35 LRRM 1131. The employer moved to set aside the enforcement decree, since under the new July 1, 1954 standards, the Board would not assert jurisdiction over a soft-drink bottling company operating under a franchise agreement. In a 2-1-1 decision, the Board denied the motion, stating that the new jurisdictional standards would apply to all cases in which a decision and order of the Board had not issued, 35 LRRM 1132.

The dissenting Board member endorsed a policy of not pursuing enforcement remedies against parties over which it would not now assert jurisdiction. It was inconsistent for the Board to proceed with the case simply because it had reached a more advanced stage in the proceedings. 35 LRRM 133, n. 8. See *Coca-Cola Bottling Co. of San Angelo* 110 NLRB No. 106, November 2, 1954, 35 LRRM 1102, the Board refused to assert jurisdiction over franchised soft-drink bottling company under new July 1, 1954 standards.

Both of the foregoing cases, *National Labor Relations Board v. Dixie Terminal Co.* 35 LRRM 2059 and *Edwin D. Wemyss d.b.a. Coca-Cola Bottling Company of Stockton* 35 LRRM 1131, conflict with deci-

sions of this Court as to the effect of subsequent changes on pending cases.

In *Re Disbarment of Isserman* ..... U.S. ....., 99 L.ed 1, this Court granted a motion for rehearing and set aside an order of disbarment. In the original proceeding on April 6, 1953, the vote of this Court resulting in the disbarment, was four justices for disbarment, the Chief Justice and three associate justices dissenting. 345 U.S. 286, 288 et seq. One year later, on April 12, 1954, this Court adopted the current Revised Rules, to be effective July 1, 1954. Rule 8 of the present Rules was amended to permit disbarment only where a majority of the justices participating concurred.

On October 14, 1954, this Court retroactively applied the new Rule 8 to the 1953 proceeding, and set aside the former order of disbarment.

In *National Labor Relations Board v. Pittsburgh S.S. Co.* 340 U.S. 498, 500, this Court held that the law governing the reviewing Court is that in force at the time of the enforcement proceeding, even though the Board's order antedated such law. See *United States v. Hooe* (US) 3 Cranch 73, 79; *Ex parte McCardle* (US) 7 Wall. 506, 514: "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

By a 1954 administrative change, this Court restricted its jurisdiction over disbarment proceedings,

and then applied such restriction retroactively to a 1953 proceeding. *Re Disbarment of Isserman* 99 L.ed 1.

The National Labor Relations Board and the reviewing courts should be required to observe the same rule of law in enforcement proceedings where, by administrative change, the Board restricts its jurisdiction over defined economic groups.

Where reason requires a change in the Board's jurisdiction policies, then such change should be applicable to all stages of pending cases, including those in the reviewing Courts. See 29 U.S.C. § 160(e), re review procedures. Where the reason for a rule ceased, the rule also ceased, *Funk v. United States* 290 U.S. 371, 384. The reason for the Board's exercise of jurisdiction over petitioner Thomas Rigging Company was the rule expressed in the *Hollow Tree Lumber Co.* and *Westport Moving and Storage Co.* cases. By the intervening cases, and the July 1, 1954 standards, these two cases have been overruled.

Under the decisions of this Court that questions of law, procedure, jurisdiction, etc., are determined according to the law prevailing at the time of the Appellate Court's decision, and not that in force at the time the judgment appealed from is rendered, all current cases, whether pending before the Board or the reviewing Courts, should be governed by the jurisdictional changes and current decisions of the Board. See *Public Utilities Com. v. United Fuel Gas Co.* 317 U.S. 456, 466; *Vandenbark v. Owens-Illinois Glass Co.* 311 U.S. 538, 541; *United States v. The Peggy* 1 Cranch 103, 110; *Dinsmore v. Southern Exp. Co.* 183 U.S. 115, 120.

2. Should the Court order requiring action by and restraining acts of petitioner Thomas Rigging Company be enforced in the future, when the Board now disclaims jurisdiction over employers in identical operations and circumstances as those of petitioner?

An order of the Board which would operate *in futuro* in a manner contrary to intervening statutory or policy changes should be set aside. *National Labor Relations Board v. L. A. Young Spring & Wire Corp.* D.C. Cir., 163 F. 2d 905, 907; *National Labor Relations Board v. Wyandotte Transportation Company* 6 Cir., 166 F. 2d 434; *National Labor Relations Board v. Budd Mfg. Co.* 6 Cir., 169 F. 2d 571.

The order and decree of the Court below requires Thomas Rigging Company to perform certain acts, and to cease and desist from other acts (R. 373 et seq.). As shown by the intervening decisions, the Board would not take jurisdiction or issue an order if the facts of the instant case were now before it. By enforcing the decree against petitioner, and at the same time having jurisdictional standards not applicable to those in petitioner's category, results in the Board permitting other such employers to be free to engage in conduct from which petitioner would be enjoined. It is for this additional reason that petitioner prays this Court to grant this petition for rehearing, filed herein because of the intervening circumstances of controlling effect.

CONCLUSION.

For the foregoing reasons, petitioner Thomas Rigging Company respectfully prays that the order of this Court denying its petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit be reheard and vacated and that the petition be granted.

Dated, San Francisco, California,
December 29, 1954.

Respectfully submitted,
ALLAN L. SAPIRO,
DOUGLAS A. NYE,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The undersigned, Allan L. Sapiro, one of the attorneys for Petitioner, hereby certifies that the petition for rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in paragraph 2 of Rule 58 as amended, and that said petition for rehearing is not interposed for delay.

Dated, San Francisco, California,
December 29, 1954.

ALLAN L. SAPIRO,
Counsel for Petitioner.